IN THE

# Supreme Court of the United States

**October Term, 1951.**

No. 143.

VERNA LEIB SUTTON,
*Plaintiff-Appellant,*

vs.

R. WELLS LEIB,
*Defendant-Appellee.*

## Statement, Brief and Argument for Appellant.

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## Statement, Brief and Argument for Appellant.

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## Report of Opinion Below.

The opinion of the District Court seems not to have been published.[1] The opinion of the Court of Appeals for the Seventh Circuit rendered April 26, 1951, rehearing denied May 22, 1951, appears in 188 F. (2d) 766.[2]

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1. Opinion of District Court (printed, T. R., pp. 44-48).
2. Opinion, Court of Appeals, Seventh Circuit (printed, T. R., pp. 87-90).

## Jurisdictional Grounds.

Jurisdiction of the federal court was predicated upon diversity of citizenship of the parties and an amount in controversy in excess of $3000. The judgment of the District Court was affirmed upon appeal to the Court of Appeals for the Seventh Circuit. A stay of mandate was granted, and jurisdiction of this court invoked by a petition of writ of certiorari which was granted October 15, 1951, pursuant to Ch. 646, 62 Stat. 928, June 25, 1948, 28 U. S. C. A. §1254.

## Statement of Facts.

In view of the concise and accurate statement of facts contained in the opinion of the Court of Appeals, we adopt that statement hereafter, to avoid controversy.

> "Plaintiff sued defendant, her first husband, for 40 alimony installments from August 1, 1944 to November 1, 1947, inclusive, alleged to be due under a divorce decree. Defendant denied the claim on the ground that his liability under the decree had been terminated by her remarriage on July 3, 1944. Her third marriage was to one Sherwood Sutton on November 21, 1947. The court rendered summary judgment in favor of defendant on his motion therefor, and the appeal is from the judgment.
>
> "The facts out of which the controversy arose are undisputed. Plaintiff obtained a decree of divorce from the defendant in 1939 in an Illinois court. The decree provided for the payment of $125 'on or before the first day of each calendar month * * * for so long as the plaintiff shall remain unmarried, or for so long as this decree remains in

full force and effect * * *.' After obtaining her divorce plaintiff moved to New York.

"On July 3, 1944, plaintiff married Walter Henzel in Reno, Nevada. Henzel had on that day obtained a decree of divorce in a Nevada court from Dorothy Henzel, a New York resident. She had been served only by publication and did not appear. Immediately following the divorce and remarriage plaintiff and Henzel returned to New York. On August 3, 1944, Dorothy Henzel instituted a separate maintenance proceeding against Walter in a New York court and this proceeding resulted in a decree in her favor, awarding separate maintenance and declaring the Nevada divorce null and void. Plaintiff had ceased living with Henzel immediately after service of summons in Dorothy Henzel's suit against him, and in January 1945 she filed suit against him for annulment of their marriage. On June 6, 1947 the New York court entered an interlocutory decree which became final three months later, declaring the nullity of the marriage of plaintiff and Henzel on the ground that he had another wife living at the time of the marriage.

"Defendant had made all the alimony payments due under the Illinois decree to and including that due on July 1, 1944. After the Nevada marriage some correspondence ensued between New York counsel for plaintiff and defendant's counsel relative to further payments. Defendant claimed a credit on account of some advances previously made to plaintiff. The matter was settled by the remittance of $180 in full on the payments due June 1 and July 1. In acknowledging the receipt of this amount by letter of September 8, 1944, plaintiff's counsel stated, 'This remittance satisfies in full the

alimony claim of the former Mrs. Leib.' Plaintiff was remarried in November 1947" (T. R., pp. 87-88).

## The Contested Issues.

1. Was the defendant relieved of his obligation to pay alimony by his payment of two months' past-due alimony?

2. Did plaintiff's entry into a void marriage ceremony with Walter Henzel in Nevada (plaintiff and Henzel being domiciled in New York) constitute a "remarriage" relieving the defendant of his obligations under an Illinois decree requiring defendant to pay alimony "for so long as plaintiff shall remain unmarried"?

3. Are the decrees of New York, which had jurisdiction of the necessary parties and subject matter, holding Henzel's Nevada divorce invalid and his remarriage void *ab initio* entitled to full faith and credit in Illinois?

## Assignments of Error.

1. The Court of Appeals erred in refusing full faith and credit to the New York decrees which adjudged the Henzel divorce in Nevada to be void and the plaintiff's remarriage to Henzel to be a nullity.

2. The Court of Appeals erred in holding the defendant discharged from his alimony obligations by plaintiff's void remarriage.

## PROPOSITIONS OF LAW.

### I.

### Was There a Valid Remarriage?

A. The burden of proof of any affirmative defense is upon the defendant who asserts it. Therefore, the defendant had the burden of here establishing his discharge or release from alimony obligations.

*Lynch* v. *Central States Life Insurance Company*, 281 Ill. App. 511 at 518;
*Kerr* v. *Schrempp*, 325 Ill. App. 614 at 617, 60 N. E. (2d) 636;
38 Corpus Juris 1327, n. 81; 53 Corpus Juris 1277.

B. Where one pays only that which he is required by law to pay, such payment cannot constitute a legal consideration for the "release" of other and additional obligations.

*Farmers and Mechanics' Life Association* v. *Caine*, 224 Ill. 599 at 606, 79 N. E. 956;
*Hayes* v. *Massachusetts Mutual Life Insurance Company*, 125 Ill. 626 at 638, 639, 18 N. E. 328, 1 L. R. A. 303.

C. A statement of a party, based upon a mistaken belief that her remarriage was valid, to the effect that her former husband was relieved from future liability, does not preclude her from recovering that to which she is legally and equitably entitled.

*Moore* v. *Shook*, 276 Ill. 47 at 54, 55, 114 N. E. 592;

*Darst* v. *Lang*, 367 Ill. 119 at 122-124, 10 N. E. (2d) 659.

D. A mere statement, or even an agreement of the parties, is wholly ineffective to terminate an obligation for alimony under an Illinois decree, unless and until such agreement is approved by the court granting the divorce.

*Walter* v. *Walter*, 189 Ill. App. 345.

E. Under Illinois law, even a court cannot relieve a defendant from liability for past-due alimony, as the right thereto is vested. It is only a provision as to future payments which a court may modify.

*San Fillippo* v. *San Fillippo*, 340 Ill. App. 353, 92 N. E. (2d) 201;
*Craig* v. *Craig*, 163 Ill. 176 at 184, 45 N. E. 153;
*Igney* v. *Igney*, 303 Ill. App. 563 at 571, 25 N. E. (2d) 608.

## II.

### Was There a Valid Remarriage?

A. The burden of proof was upon the defendant to show the plaintiff's remarriage to be valid. He failed in that proof when it was shown that New York, which had jurisdiction over the parties and subject matter, had held such remarriage to be void *ab initio*.

*Williams* v. *North Carolina*, 325 U. S. 226, 65 S. Ct. 1092, 89 L. Ed. 1577;
*Johnson* v. *Muelberger*, 340 U. S. 581, 71 S. Ct. 474, 95 L. Ed. 411.

B. A "remarriage," prescribed by a statute or divorce decree, contemplates, not a hollow ceremony, but a valid marriage imposing legal obligations upon the new spouse.

*Shamblin* v. *State Compensation Commissioner*, 122 W. Va. 652, 12 S. E. (2d) 527 at 529;
*Sherman* v. *Federal Security Agency*, 166 F. 2d 451, 453-454.

C. Where the defendant's liability arose under an Illinois decree of divorce, the remarriage which would discharge him from liability must be such a remarriage as Illinois would recognize as valid, irrespective of its status in Nevada. Illinois does not recognize such a remarriage as valid.

*Jardine* v. *Jardine*, 291 Ill. App. 152, 9 N. E. (2d) 645;
*Lincoln* v. *Riley*, 217 Ill. App. 571 at 575;
*People* v. *Shaw*, 259 Ill. 544, 102 N. E. 1031.

D. Illinois is not bound to, and does not, recognize as valid a Nevada remarriage of persons domiciled in another state, where the supposedly divorced spouse of the of them was not personally served and entered no appearance in Nevada.

*Jardine* v. *Jardine*, 291 Ill. App. 152, 9 N. E. (2d) 645;
*Atkins* v. *Atkins*, 393 Ill. 202 at 207 et seq., 65 N. E. (2d) 891.

E. Under Illinois law, a marriage to one who already has a wife living is absolutely void from inception and requires no decree of court to establish its invalidity.

*Cartwright* v. *McGown*, 121 Ill. 388, 12 N. E. 377 at 395;
38 Corpus Juris 1294, §§45, 48.

F. There is a vast difference between a remarriage which is in violation of a directory provision of a statute and a remarriage which is bigamous. The first is *malum prohibitum* and is not void where performed. The second is *malum in se* and is void everywhere.

Restatement of the Conflict of Laws, §§129-132;
38 Corpus Juris, 1277, 1294-1296.

## III.

## Are the New York Decrees Entitled to Full Faith and Credit?

A. The divorce decree of a state other than the domicile of the parties is entitled to full faith and credit only where one of two conditions appears: (a) the defendant appears and contests the proceedings; or, (b) the defendant is personally served with process.

*Williams* v. *North Carolina*, 325 U. S. 226, 65 S. Ct. 1092, 89 L. Ed. 1577;
*Esenwein* v. *Commonwealth of Pennsylvania*, 325 U. S. 279, 65 S. Ct. 1118, 89 L. Ed. 1608;
*Sherrer* v. *Sherrer*, 334 U. S. 343, 68 S. Ct. 1087, 92 L. Ed. 1429;
*Johnson* v. *Muelberger*, 340 U. S. 581, 71 S. Ct. 474, 95 L. Ed. 411.

B. Nevada does not hold valid its own divorce decrees where there was no bona fide domicile of one seeking a divorce in that state.

*Aspinwall* v. *Aspinwall*, 40 Nev. 55, 184 P. 810;
*Walker* v. *Walker*, 45 Nev. 105, 198 P. 433;
*Lewis* v. *Lewis*, 50 Nev. 419, 264 P. 981, rehearing denied, 50 Nev. 419, 267 P. 399;
*Latterner* v. *Latterner*, 51 Nev. 285, 274 P. 194.

C. The state of domicile (here, New York) may pass upon and determine the matrimonial status of its citizens, if a foreign adjudication was in a mere *ex parte* proceeding.

*Williams* v. *North Carolina*, 325 U. S. 226, 65 S. Ct. 1092, 89 L. Ed. 1577;
*Sherrer* v. *Sherrer*, 334 U. S. 343, 68 S. Ct. 1087, 92 L. Ed. 1429.

D. The decrees of New York, which had all parties to those questions personally present, adjudging the Henzel divorce invalid and plaintiff's remarriage a nullity, are entitled to full faith and credit in all states, including Illinois and Nevada.

*Sherrer* v. *Sherrer*, 334 U. S. 343, 68 S. Ct. 1087, 92 L. Ed. 1429;
*Johnson* v. *Muelberger*, 340 U. S. 581, 71 S. Ct. 474, 95 L. Ed. 411.

E. The defendant, as well as all third persons, is bound by the New York decrees, where the parties to such decrees were personally present before the court.

*Johnson* v. *Muelberger*, 340 U. S. 581, 71 S. Ct. 474, 95 L. Ed. 411.

## ARGUMENT.

### Introduction to Issues.

There are no factual issues to quibble over. The questions of law are important ones and should be squarely adjudicated to settle any doubt remaining in similar cases.

From the Statement of Facts concisely set forth by the Circuit Court of Appeals for the Seventh Circuit, we have the following situation. Appellant, whom we will hereafter refer to as "plaintiff," was divorced from the appellee, hereinafter called "defendant," in 1939. The decree was an Illinois decree requiring the payment of $125 a month "for so long as the plaintiff shall remain unmarried." No alimony payments have been made for the months of August 1944 to November 1947, inclusive, at which latter time the plaintiff married Sutton. This leaves, prima facie, $5,000 due under the Illinois divorce decree, unless the defendant was properly entitled to a summary judgment upon either of his two affirmative defenses, which we will discuss shortly.

Before going into that, however, we do want to emphasize that the obligation is an Illinois obligation, and, under the well-settled rules of this Court, the federal court must determine whether or not Illinois courts passing upon these issues would hold the defendant discharged. It is for that reason, except for questions as to full faith and credit, that we have cited Illinois cases almost exclusively. If the defendant contends he was released, we must consider whether Illinois would consider him released; if he contends that plaintiff "remarried" in 1944, we must consider whether such ceremony constituted a remarriage within the contemplation of the Illinois decree. Necessarily, of course, the efficacy of acts in New York and Nevada, so far as full faith and credit are concerned, will

be determined by this Court's decisions, and it is upon such citations which we rely.

We start, then, with the Illinois divorce decree requiring the defendant to pay alimony. Looking to Illinois acts alone, the defendant appears to be liable for the $5,000 which he is in arrears. He has the burden of proving an affirmative defense to escape liability. There are two possible affirmative defenses, and defendant relies upon both. They are, briefly, as follows.

1. *By a release from the plaintiff.* To determine this question, we must look to Illinois law, as did the Court of Appeals. The District Court found for the defendant upon this issue, but the Court of Appeals reached a different conclusion. Illinois holds, as we shall point out, that an agreement to release one from alimony obligations is ineffective unless approved by the court which granted the divorce. Admittedly, such court approval was never secured. Illinois also holds that even the court entering the alimony decree cannot relieve the defendant from obligations for "accrued" alimony, as these rights are vested—but such court can only reduce or eliminate "future" obligations. Furthermore, it is the universal rule that where one pays only that which he is legally obligated to pay, such payment constitutes no consideration for a release of a separate and independent obligation. These matters we will discuss in Section I.

2. *By fulfillment of the provision of the decree* requiring payment of alimony "for so long as the plaintiff shall remain unmarried." It is obviously right that one man's obligation to pay alimony should cease when another man's obligation to support the ex-wife commences. However, if the remarriage ceremony is an absolute nullity, the same reasons are not present. Illinois holds a

marriage absolutely void where one spouse has a wife living in his domicile from whom he was not validly divorced. We believe the Nevada divorce was invalid, and that the New York decrees establishing the remarriage to be void ab initio are entitled to full faith and credit. These questions will be discussed under Sections II and III.

Now, with reference to the first defense, which we discuss in Section I following, perhaps that material should have been deleted. The Court of Appeals found adversely to the defendant thereon. *The defendant prosecuted no cross-appeal to this Court.* As we understand the Rules, the determination of the Court of Appeals is final as to issues not presented to this Court by cross-appeal. But since this Court might take a different view upon that procedural question, out of an excess of safety we have discussed this aspect of the case briefly.

With this introduction to explain our approach to these questions, we are abbreviating the following discussion so far as possible to serve the convenience of this Court.

## I.

## Was There a Valid Release?

A. The burden of proof of any affirmative defense is upon the defendant who asserts it. Therefore, the defendant had the burden of here establishing his discharge or release from alimony obligations.

The statement is self-explanatory, and all authorities agree that one pleading a discharge from liability bears the burden of establishing his defense. It was, therefore, incumbent upon the defendant to show the manner in which the Illinois decree, imposing his obligation, was satisfied. If a court were required to resort to conjecture to determine this issue, such burden of proof would not be satis-

fied. However, we believe the Statement of Facts of the Court of Appeals shows the facts to be undisputed, presenting clean-cut legal issues.

B. Where one pays only that which he is required by law to pay, such payment cannot constitute a legal consideration for the "release" of other and additional obligations.

The defendant was obligated to pay the plaintiff $250, which he was in arrears for the months of June and July 1944. When plaintiff demanded payment of this accrued amount, the defendant claimed credit or $70, which he said he had advanced to her previously. Accordingly, he sent the plaintiff only $180 for those two payments, which sum the plaintiff accepted. There was no dispute that this $180 was owing, but defendant has claimed that this sum was a consideration for the plaintiff writing a letter acknowledging such payment "in full of alimony claimed" (T. R., pp. 60-66). There was no formal written release, but defendant claimed that this letter and other correspondence released him.

As the Court of Appeals pointed out, since the defendant had to pay the $180 irrespective of whether the plaintiff had remarried or not, this same sum of money could not constitute a legal consideration for a release of "future" alimony. This position is obviously correct. It is only where a demand is disputed and unliquidated that a payment can constitute a consideration for a release from a larger asserted liability. If the amount is liquidated and ascertainable, the discharge is only one *pro tanto*. Illinois adheres to this rule (infra, p. 17).

This is most easily illustrated by a simple example. James Clarke, let us say, takes out a life insurance policy for $10,000 with double indemnity for accidental death. He is drowned on a picnic, after the incontestable period has run. The insurance company claims that the circum-

stances were such as to make it probable that Clarke committed suicide. It denies liability for the double indemnity, although admitting liab' ity for the face of the policy. It tenders a check for $10,000 to the widow, which she accepts, and she executes a release. A week later, upon receiving legal advice, she sues for the $10,000 claimed to be due for the double indemnity. She can recover, provided she proves accidental death. The release is wholly ineffective to bar the suit. The company merely paid what it was legally obligated to pay without dispute, and there was no legal consideration for the release of the disputed item.

C. A statement of a party, based upon a mistaken belief that her remarriage was valid, to the effect that her former husband was relieved from future liability, does not preclude her from recovering that to which she is legally and equitably entitled.

The courts used to be quite stringent in distinguishing between mistakes of fact and mistakes of law. Illinois does not fall in this category. *Darst* v. *Lang*, 367 Ill. 119 at 122-124, 10 N. E. (2d) 659. Even if we were incorrect in our prior statement that there was no valid release, because there was no legal consideration, the plaintiff would still recover because of the Illinois attitude as to a release executed under a mistaken belief. Even if Mrs. Sutton had executed a formal written release for a consideration to the defendant, but had done so upon the mistaken belief that she was then married to Henzel, or that her remarriage discharged the defendant's obligation, equity would grant her relief.

This general rule is pointed out in *Moore* v. *Shook*, 276 Ill. 47 at 54, 55, 114 N. E. 592, where the court points out that a mistaken belief as to marital status is considered a mistake of fact; but irrespective of how it is considered, it is such a mistake as will permit equity to extend relief. This rule would control here.

D. A mere statement, or even an agreement of the parties, is wholly ineffective to terminate an obligation for alimony under an Illinois decree, unless and until such agreement is approved by the court granting the divorce.

Illinois does not recognize as valid a contract or agreement which purports to terminate alimony obligations, *unless such contract is approved by the court granting the divorce and retaining jurisdiction over the subject matter.* The reason for our rule is that we believe the State is an interested party to all matrimonial actions. We require court approval in order to make certain that no woman shall be left without support or shall become destitute. Otherwise it would be a simple matter for an ex-husband to dangle a few thousand dollars before a gullible woman's eyes and to induce her to exchange her future security for a present mink coat. After the money was dissipated, the woman might become a ward of the state.

The Illinois rule is announced in many cases. An excellent annotation of leading cases upon this question is contained in *Walter* v. *Walter,* 189 Ill. App. 345 at 348, 349, quoting, among other cases, *Audubon* v. *Shufeldt,* 181 U. S. 575. The general principle is stated by our court to be that "laws enacted from considerations of public concern, and to subserve the general welfare, cannot be abrogated by mere private agreement."

E. Under Illinois law, even a court cannot relieve a defendant from liability for past due alimony, as the right thereto is vested. It is only a provision as to future payments which a court may modify.

This rule is accepted law in Illinois and was adopted by the Court of Appeals in its opinion. Actually, it is not pertinent here, since the defendant has not contended that the Illinois court at any time modified its alimony order so as to discharge him. But the doctrine illustrates the lengths to which our Illinois courts go to protect one who

is dependent for support upon alimony payments. The husband could not have been discharged from his accrued obligations by anyone—even the Illinois court. Therefore, since his obligation of $180 was an item which could not have been terminated or reduced, it could not provide a consideration for reducing or terminating future obligations. This leaves only one possible avenue for escape for the defendant—that is, to establish that there was a valid "remarriage" of the plaintiff. As we shall point out in Sections II and III, there was no valid remarriage.

To illustrate the point last discussed, however, let us look at a recent Illinois case, which also deals with the question of release. Last year, the decision of *San Fillippo* v. *San Fillippo,* 340 Ill. App. 353, 92 N. E. (2d) 201, was rendered. The facts were as follows. The divorce was rendered in 1947 and provided for $50 a week alimony, plus the payment of certain outstanding obligations. On March 1, 1948, a petition was filed by the wife to require the defendant to show cause why he should not be held in contempt for failure to pay total arrearages of $2,316, consisting primarily of alimony. On that date an agreed order was entered by the court as follows:

> "On Motion of Attorney for Plaintiff for a Rule to Show Cause and the Plaintiff and Defendant agreeing to settle & dispose of the matter with reference to alimony arrearage, past, present, & future, and any other claims outstanding at present time; And the Defendant offering sum of $500.00 in full of all alimony and attorneys fees, past, present, & future. And the Plaintiff is willing to accept the sum of $500.00 in full of all Alimony, past, present & future; And the Court having jurisdiction over parties and the subject matter:

"It is hereby ordered that the sum of $500.00 tendered to Plaintiff by Defendant & the acceptance of said sum by Plaintiff is in full of all claims for alimony, past, present & future herein.

"Enter GEORGE M. FISHER
"Judge."

Subsequently, the plaintiff secured a new attorney and filed a petition to set aside such order as not based upon a valid consideration and as being entered without proper jurisdiction. The court made three primary holdings: (1) That the provision for alimony contained in the original decree could not be modified by subsequent court order, except as to future alimony where a change of financial circumstances is shown; (2) In the absence of an express petition by the husband asking relief based upon a change of circumstances, even the court which entered the divorce decree had no jurisdiction to modify such decree, and the modification was void; (3) That the purported settlement for $500.00 was not effective to bind the plaintiff.

## II.

### Was There a Valid Remarriage?

A. The burden of proof was upon the defendant to show the plaintiff's remarriage to be valid. He failed in that proof when it was shown that New York, which had jurisdiction over the parties and subject matter, had held such remarriage to be void *ab initio* (T. R., pp. 27-28; 33-34).

Illinois, until the present hearing in the District Court, had no occasion to pass upon the validity of the remarriage of the plaintiff to Henzel. Nor has Nevada passed

upon this question. But New York, the state of plaintiff's and Henzel's domicile, has passed upon this question, and it has decreed such marriage to be void *ab initio*, in a proceeding in which plaintiff and Henzel appeared and litigated this very issue. Surely, with this a primary question for determination here, this New York decree cannot be ignored. It is entitled to full faith and credit and concludes this issue.

It does not seem that the domicile of the parties is to be ignored for all purposes. For example, the language of this Court seems pertinent in *Johnson* v. *Muelberger*, 340 U. S. 581, 71 S. Ct. 474, 95 L. Ed. 411, where it was stated:

> "That the jurisdiction of the Florida court to enter a valid decree of divorce was dependent upon petitioner's domicile in that state is not disputed * * *. Here, unlike the situation presented in *Williams* v. *North Carolina*, 325 U. S. 226, 65 S. Ct. 1092, 89 L. Ed. 1577, 157 A. L. R. 1366 the finding of the requisite jurisdictional facts was made in proceedings in which the defendant appeared and participated."

When New York was the domicile of the parties, namely, plaintiff and Henzel, and had jurisdiction to determine the validity of their marriage, its decree would seem to be conclusive for all purposes and in all states. Illinois will not refuse to accord it full faith and credit.

B. A "remarriage," prescribed by a statute or divorce decree, contemplates, not a hollow ceremony, but a valid marriage imposing legal obligations upon the new spouse.

There is sound reason for this rule. A provision discharging a man from alimony obligations upon remariage

of his former wife contemplates that a woman is not ordinarily entitled to support from two husbands at the same time. When a new husband's obligation of support commences, the former husband's obligation terminates. But, if the new marriage is wholly void, so that the new spouse does not become liable for such support, a different rule must follow, for two reasons. One is that such provision for the termination of alimony never contemplated a release from liability except by the substitution of someone to take over the support obligation. Second, is the rule of public policy which envisions that the woman might otherwise become a ward of the state.

For the same reason of public policy, the courts will not indulge in technicalities of construction. They are not interested in a mock ceremony or a void marriage—but in a real substitution of one whose duty it is to furnish support in the stead of another. Unless the realities of the situation so appear, there is no "remarriage."

C. Where the defendant's liability arose under an Illinois decree of divorce, the remarriage which would discharge him from liability must be such a remarriage as Illinois would recognize as valid, irrespective of its status in Nevada. Illinois does not recognize such a remarriage as valid.

For the same reasons as just indicated in B, above, we must look directly to the public policy of Illinois. Assume, for the moment with us, that Henzel's Nevada divorce was invalid. (If it was valid, then New York was wrong, the defendant is correct, and this controversy can end here and now.) Then, when Henzel and the plaintiff went through a form of wedding ceremony, Henzel already had a wife living, and the second marriage was bigamous. Illinois holds such a marriage to be void.

In *People* v. *Shaw*, 259 Ill. 544, 102 N. E. 1031, Shaw was convicted of bigamy in Illinois, but the conviction was

reversed by our Supreme Court upon the following facts. Shaw married Lenore Smith in Chicago, but before that time he had married Helen Olson in New York. Helen Olson's history was, however, that she had been previous married to Edward Olson in New York, but Olson procured a divorce in California upon the ground of desertion, with service of process being made only by publication upon Helen Olson. The defense of Shaw was that his marriage to Helen Olson was null and void, because the Olson divorce in California was not effective. With this contention our Illinois court agreed. The court declared:

> "Plaintiff in error contends that by reason of the foregoing facts his alleged marriage to Helen Olson in New York City on September 19, 1900, was null and void, and that he therefore did not commit the crime of bigamy by marrying Lenore Smith on November 28, 1910. Counsel for the State contend that Helen Olson and plaintiff in error were residents of Illinois at the time of their marriage and were in the State of New York temporarily at that time. It is not necessary to determine what effect, if any, that would have on the validity of that marriage, as it conclusively appears from the evidence that Helen Olson was at that time, and had been for several years, a resident of the State of New York. Under the laws of New York this marriage was void, (*People* v. *Baker*, 76 N. Y. 78; *O'Dea* v. *O'Dea*, 101 id. 23; *Williams* v. *Williams*, 130 id. 193); and as the law of New York must control as to the validity of the marriage, (*McDeed* v. *McDeed*, 67 Ill. 545; *Canale* v. *People*, 177 id. 219; *Reifschneider* v. *Reifschneider*, 241 id. 92); it must be held to be void in this State. His marriage with Helen Olson being invalid because of her inability to enter into the contract, plaintiff in error did not

commit bigamy by his later marriage with Lenore Smith."

It is apparent that Illinois holds the domicile to control upon the efficacy of a marriage, and, where the parties are domiciled either in Illinois or New York, a bigamous remarriage is completely void.

D. Illinois is not bound to, and does not, recognize as valid a Nevada remarriage of persons domiciled in another state, where the supposedly divorced spouse of one of them was not personally served and entered no appearance in Nevada.

To continue the train of thought from section C, above, Illinois now holds such a decree as Henzel's Nevada decree to be void for lack of domicile. *Atkins* v. *Atkins*, 393 Ill. 202 at 207, 208, 65 N. E. (2d) 801. But there is even a more interesting case decided by Illinois quite parallel with the existing situation, which illustrates the construction Illinois places upon the "remarriage" as affecting defendant's obligations under his Illinois alimony decree.

In *Jardine* v. *Jardine*, 291 Ill. App. 152, 9 N. E. (2d) 645, Jardine left New York State in 1931 and went to Reno, where he established a six weeks' residence and secured a divorce from his New York wife. He left Nevada the same day and married the plaintiff in Illinois, and they both then went to New York. The plaintiff in 1935 brought an action in Illinois to have her marriage to Jardine declared a nullity upon the ground that it was bigamous and void, contending that the Reno divorce was invalid. The court declared:

"Since the Nevada court was without jurisdiction and therefore without power or authority to enter its divorce decree, such decree was not legally effective to sever the marital relation exist-

ing between the defendant and his then wife. That divorce being void, defendant was not free to remarry and his marriage afterward to plaintiff pursuant to it was also void. The invalidity of the marriage of the parties to this proceeding was an established fact since its very inception. * * * ".

E. Under Illinois law, a marriage to one who already has a wife living is absolutely void from inception and requires no decree of court to establish its invalidity.

This, again, is a projection closely connected with B, C, and D, supra. New York held the remarriage to be a nullity. Would Illinois do the same?

In *Cartwright* v. *McGown*, 121 Ill. 388, 12 N. E. (2d) 737, it was declared at page 395:

> "The marriage of a man and woman, where one of them has a husband or wife by a prior marriage, who is then living and undivorced, is void, and not merely voidable. Being a nullity, no decree is necessary to void the same."

This general rule is substantiated by 38 Corpus Juris 1294, 1295, as follows:

> "A person who has contracted a valid marriage is utterly incapacitated, while such marriage remains undissolved by death or divorce, to contract a subsequent marriage; and a purported marriage contracted by one so incapacitated is a mere nullity, and will be declared to be such in any proceeding, direct or collateral, where the question may arise, and no judicial decree is necessary to establish its invalidity. * * * "

If something is a nullity, it is nothing. It is as if it had never happened. *Ergo post propter hoc*, it never hap-

pened and the obligation exists as before. We apologize if our language sounds strangely reminiscent of Ko-Ko in the Mikado, "Consequently, that gentleman is as good as dead—practically, he is dead—and if he is dead, why not say so?"

F. There is a vast difference between a remarriage which is in violation of a directory provision of a statute and a remarriage which is bigamous. The first is *malum prohibitum* and is not void where performed. The second is *malum in se* and is void everywhere.

Perhaps this is rebuttal in character, but after extensive arguments in two courts, one becomes familiar with defensive arguments and authorities. We request this Court to bear one legal proposition in mind while reading defensive briefs. It is as follows.

If Henzel was validly divorced by his Nevada decree, then New York was wrong and we have no right to recover. If he was not divorced, then his marriage to plaintiff was bigamous. As such, the remarriage was in violation of public policy and void everywhere. It is *malum in se*.

This must be distinguished from the violation of a purely directory provision of a statute. Indiana grants a divorce, let us say, but slaps both parties upon the wrists and tells them, "Now don't get remarried for a year." But one party moves to Virginia and does remarry. Now there is nothing offensive to public morals in such remarriage; there is nothing which is repugnant to universal public policy. There is no bigamy. The remarriage, while violative of the Indiana statute, would be merely *malum prohibitum* and recognized everywhere except, perhaps, Indiana and, under many circumstances, Indiana would be required to recognize the remarriage as valid.

We ask the Court to bear this distinction in mind in reading cases cited by the defendant.

## III.

## Are the New York Decrees Entitled to Full Faith and Credit?

A. The divorce decree of a state other than the domicile of the parties is entitled to full faith and credit only where one of two conditions appears: (a) the defendant appears and contests the proceedings; or, (b) the defendant is personally served with process.

The Court of Appeals apparently adopted the view that the decree of divorce may be valid in Nevada but invalid in New York, which threw the court into utter confusion as to how to apply the full faith and credit clause. It finally concluded by giving full faith and credit to the Nevada decree and denying such full faith and credit to the New York decrees, which latter state actually had jurisdiction of the parties, and tried the issues upon the merits (T. R., pp. 27-28; 33-34).

It is our feeling that the recent decisions of this Court have wholly removed any ambiguity. The application of full faith and credit depends upon whether or not the defendant in the divorce action had his or her day in court to contest the various issues, including jurisdiction in the divorcing state to deal with the parties and subject matter. If such defendant was personally served in that state or appeared and contested the issues, this Court has consistently held that the determination by that state is final, and the question cannot be relitigated *ad infinitum*. If, however, that defendant was neither served with process in that state nor had an opportunity to contest the issues upon the merits or pertaining to jurisdiction, a different result must follow. In such an instance, when the courts of the domicile subsequently adjudicate this question between the parties, in a proceeding where both parties ap-

pear and present their arguments, its determination that such divorce was invalid is final. Such decree would then be entitled to full faith and credit in all states, including the state which had granted the divorce.

This rule was clearly laid down by Mr. Justice Frankfurter in the second *Williams* case, 325 U. S. 226, 65 S. Ct. 1092 at 1095, 89 L. Ed. 1577, when he stated:

> "It is one thing to reopen an issue that has been settled after appropriate opportunity to present their contentions has been afforded to all who had an interest in its adjudication. This applies also to jurisdictional questions. After a contest these cannot be relitigated between the parties."

It seemed to us that the language of this Court was very clear, but fundamentally the same question again arose in *Sherrer* v. *Sherrer*, 334 U. S. 343, 68 S. Ct. 1087, 92 L. Ed. 1429. Mr. Chief Justice Vinson expanded these holdings, speaking as follows in 68 S. Ct. 1087 at 1089, 1093:

> "That the jurisdiction of the Florida court to enter a valid decree of divorce was dependent upon petitioner's domicile in that state is not disputed. * * * Here, unlike the situation presented in *Williams* v. *North Carolina*, 1945, 325 U. S. 226, 65 S. Ct. 1092, 89 L. Ed. 1577, 157 A. L. R. 1366, the finding of the requisite jurisdictional facts was made in proceedings in which the defendant appeared and participated. * * * It is one thing to recognize as permissible the judicial reexamination of findings of jurisdictional fact where such findings have been made by a court of a sister State which has entered a divorce decree in ex parte proceedings. It is quite another thing to hold that the vital rights and

interests involved in divorce litigation may be held in suspense pending the scrutiny by sister States of findings of jurisdictional facts made by a competent court in proceedings conducted in a manner consistent with the highest requirements of due process and *in which the defendant has participated.*" (Italics added.)

In its last declaration in *Johnson* v. *Muelberger*, 340 U. S. 581, 71 S. Ct. 474, 95 L. Ed. 411, this Court used similar language:

> "It is clear from the foregoing that, under our decisions, a state by virtue of the clause must give full faith and credit to an out-of-state divorce, by barring either party to that divorce who has been personally served or who has entered a personal appearance from collaterally attacking the decree."

Now the effect of those decisions seems clear. If Nevada had required Dorothy Henzel to be personally served, or if she had appeared and contested the issues in that state, both New York and Illinois would be required to give full faith and credit to its decree. The same result does not follow as to an *ex parte* proceeding. To the contrary, when New York had jurisdiction over the parties who appeared and litigated the matter of the validity of the divorce decree, the decision of New York was absolutely binding upon them and was entitled to full faith and credit in every state in the nation—including Nevada. Marital rights and obligations must be settled with some finality. A man cannot be divorced in one state and married in another, any more than a nation can exist half slave and half free.

Forgetting the divorce situation entirely, assume that John Jones secures a judgment by confession against James Brown in Cincinnati, Ohio. At that time James

Brown lives in Chicago and John Jones takes his Ohio judgment and sues Brown in Illinois upon it. Brown defends the case and affirmatively proves that the note was secured by fraud. The Illinois court not only denies relief to the plaintiff but enters a declaration that the note is void and invalid, and that the judgment procured in Ohio is unenforceable. It would be a strange anomaly if John Jones, later finding Brown in Virginia, could institute a new suit in Virginia upon the same obligation and require Brown again to establish his non-liability. Nor could Jones claim that Virginia should recognize the Ohio judgment rather than the Illinois holding.

In this case, we do not feel that Dorothy Henzel was required, after winning her case in New York, to go to Nevada to adjudicate again the same matter. Nor do we believe it was incumbent upon the petitioner here, after New York had held the Henzel divorce decree invalid and the petitioner's remarriage to be void *ab initio*, to go to Nevada to secure another decree to the same effect—particularly when she could not even have secured personal service upon Walter Henzel if she had done so. Nevada, as a sister state in our union, was and is bound to give full faith and credit to the actions of New York, which had determined these questions after full appearance and contest by all parties in interest.

B. Nevada does not hold valid its own divorce decrees where there was no bona fide domicile of one seeking a divorce in that state.

Actually, it seems immaterial as to the holdings in the State of Nevada upon like questions. However, Nevada has repeatedly held that a divorce decree rendered in that state is nugatory, where a domiciliary of another state goes there merely for the purpose of procuring a divorce and departs immediately thereafter. In *Aspinwall v. Aspin-*

*wall*, 40 Nev. 55, 184 P. 810, Nevada pointed out that the question of domicile was vital in determining jurisdiction. In *Walker* v. *Walker*, 45 Nev. 105, 198 P. 433, the court declared:

> "Residence in this state for the statutory period * * * is not sufficient to give jurisdiction, but a bona fide residence with the intention of remaining must appear."

In the other cases cited under our "Propositions of Law" it is pointed out that the statutory requirements in that state were adopted to prevent the abuses of its laws which had led to great criticism, and that a bona fide domicile was absolutely essential in order for its court to obtain jurisdiction to grant a divorce decree.

Under these circumstances, it is apparent that Nevada would have reached a result similar to that of the State of New York under the facts of this case, and there is no reason to believe that Nevada would deny full faith and credit to the New York holdings. Under the provisions of our Constitution, Nevada is bound by the result in New York.

C. The state of domicile (here, New York) may pass upon and determine the matrimonial status of its citizens, if a foreign adjudication was in a mere *ex parte* proceeding.

The above statement had always been considered to be the law, prior to the second *Williams* case. We believe there is no question that it is still the law. As stated in *Sherrer* v. *Sherrer*, 334 U. S. 343, 68 S. Ct. 1087, 92 L. Ed. 1429:

> "It is one thing to recognize as permissible the judicial reexamination of findings of jurisdictional fact where such findings have been made by a court of a sister State which has entered a divorce decree in ex parte proceedings. It is quite another thing * * *"

We presume that the above language recognizes the continuance of the former rule permitting an examination by the state of the domicile of all questions pertaining to jurisdiction of a court which acted in a mere *ex parte* proceeding, as here.

D. The decrees of New York, which had all parties to those questions personally present, adjudging the Henzel divorce invalid and plaintiff's remarriage a nullity, are entitled to full faith and credit in all states, including Illinois and Nevada.

Without reiterating the matters discussed under paragraph A, supra, we believe that the language of those cases is conclusive upon this issue. This Court has repeatedly pointed out that, where jurisdictional questions have been litigated once between the parties, they cannot be relitigated in another forum. In this case, those issues were fully litigated in New York, and all the parties involved in those controversies had an opportunity to raise any question desired, either in support of the Nevada acts or in opposition thereto. The New York courts necessarily had to determine the questions of domicile, *bona fides* of Walter Henzel in going to Nevada, and other questions involved in the matter of jurisdiction. Thereafter, the decrees of New York were conclusive upon all persons, and those decrees must be given full faith and credit by all other states.

E. The defendant, as well as all third persons, is bound by the New York decrees, where the parties to such decree were personally present before the court.

There was, of course, no occasion for the present defendant to be made a party to the New York annulment proceedings or to the Henzel separate maintenance suit.

Nevertheless, that does not preclude such decrees from being binding and operative upon the defendant, as well as all third persons. An excellent illustration of this arises in *Johnson* v. *Muelberger*, 340 U. S. 581, 71 S. Ct. 474, 95 L. Ed. 411. There, a daughter of one of the parties sought to attack in New York the validity of a decree rendered in Florida. This Court pointed out that where the court actually had jurisdiction of the parties and subject matter, that the decree could not be attacked either by parties to the proceeding or by strangers, and that it was conclusive upon them.

**Summary.**

From the foregoing discussion, it is apparent that several matters must be accepted as conclusive: (1) New York, in a proper proceeding, has already held Henzel not to have been divorced when he entered into a marriage ceremony with the plaintiff, and it has also held the marriage to be void *ab initio;* (2) Such decrees, rendered with jurisdiction over the parties and subject matter, are conclusive upon the parties to them and strangers to the proceedings, and must receive full faith and credit in all jurisdictions; (3) Illinois would, if the same situation were presented to it for determination as was presented to New York, arrive at the same result; (4) The remarriage was not such a remarriage as Illinois contemplated as relieving the defendant from his obligations, and was ineffective for that purpose; (5) There was no valid discharge of the defendant's obligation arising under the Illinois alimony decree.

For the above and foregoing reasons, it is respectfully prayed that the respective orders and judgments of the Court of Appeals for the Seventh Circuit and of the United States District Court for the Southern District of Illinois, be reversed and the cause remanded with directions to enter judgment for the plaintiff for said accrued ali-

mony in the amount of $5,000, together with interest from the time of its accrual, and court costs incurred in these various proceedings, and for such other and further relief as may seem fitting and proper.

Respectfully submitted,

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